

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on :11.05.2007

+

CRL REV. P. No.48/2005

SMARTY MACHRA & ANOTHER

... Petitioners

- versus -

STATE (GOVT OF NCT OF DELHI)

... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Rajender Kumar

For the Respondent/State : Mr V.K. Malik

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

- | | | |
|----|---|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

BADAR DURREZ AHMED, J

1. This revision petition is directed against the judgment of the learned Additional Sessions Judge delivered on 21.12.2004 whereby the revision petition filed on behalf of the State against the order passed by the learned Metropolitan Magistrate on 01.05.2004 was allowed, the result being that the trial court was directed to frame charges under Sections 379/411/34 IPC against both the petitioners and was directed to proceed with the trial in accordance with law.

2. The facts of the case, as per the prosecution, are that on 19.06.1998, the complainant [Shri N.P. Singh] lodged a complaint with the police that on the intervening night of 18th and 19th June, 1998, his car stereo of make "PIONEER" was stolen from his car which was parked outside his house at J-3/4, Rajouri Garden, Delhi. In the said complaint, it was further mentioned that one Shri Ashok Kumar resident of C-55, Nangloi Extn. had told the complainant that his car stereo was also stolen. Mr Ashok Kumar's car number was given as HR 05 F-0018 and it was allegedly parked near Super Bazar. Thereafter, an FIR No.419/1998 under Section 379 IPC was registered at police station Rajouri Garden on the basis of the said complaint by Shri N.P. Singh. Apparently, during investigation, the petitioners (Smarty Machra and Manish Gandhi) were arrested on 23.06.1998. A car stereo with remote is alleged to have been recovered from the possession of the accused Smarty Machra. Another car stereo is alleged to have been recovered from the possession of the accused Manish Gandhi.

3. Separate disclosure statements are alleged to have been made by both the accused wherein they have allegedly stated that they had been stealing stereos earlier. Furthermore, it is alleged that pointing out memos of the place of incident were also prepared at their instance. After completing the investigation, a charge-sheet under Section 379/411/34 IPC was filed against both the accused.

4. Before the learned Metropolitan Magistrate, the learned counsel appearing for the accused, had submitted that a single FIR had been registered by the police for two distinct offences. It was further submitted on behalf of the accused that the recovery memos in respect of the car stereos allegedly recovered from them do not bear their signatures. The alleged disclosure statements also do not bear the signatures of the accused. It was also submitted that a single charge-sheet was filed against the accused for two distinct offences and, according to the learned counsel for the accused, this was not permissible. Accordingly, a prayer for discharge of the accused persons was made.

5. On the other hand, the learned Additional Public Prosecutor appearing for the State submitted before the learned Metropolitan Magistrate that there is no bar to registering a single FIR in respect of two offences of a similar nature committed at the same time in the same locality. It was submitted that the FIR was merely a piece of information with regard to the commission of cognizable offences so as to put the police machinery into motion. It was submitted that the accused in their purported disclosure statements have stated that they had committed a number of offences jointly. With respect to the absence of signatures of the accused on the recovery

memos, it was submitted that this was a mere omission on the part of the investigating officer for which the accused were not entitled to any benefit.

6. After hearing the arguments advanced on behalf of the accused and the State, the learned Metropolitan Magistrate observed that two car stereos were stolen from different cars belonging to different persons. The said car stereos were also allegedly recovered from the separate possession of each of the accused, i.e., one from each of the accused. It is material to note that the learned Metropolitan Magistrate had observed that the accused persons had allegedly disclosed a number of offences committed by both of them, but they had not admitted or disclosed the commission of the offences in the present case. In these circumstances, the learned Metropolitan Magistrate came to the conclusion that the offences were distinct and for which the accused persons could not be tried together. With regard to the reliance to be placed on the disclosure statements, the learned Metropolitan Magistrate noted that the purported disclosure statements were recorded after the alleged recovery had been effected. It was also noted that even otherwise the purported disclosure statements had no value as the accused had not disclosed the commission of the offences in the present case. The learned Metropolitan Magistrate also noted that there was no material to indicate the ownership of the two car stereos by Shri N.P. Singh and Shri Ashok Kumar. Even the car stereo was not released under the Superdari of Mr N.P. Singh and no TIP of the stereo, allegedly

belonging to Mr Ashok Kumar, was done. Finally, the learned Metropolitan Magistrate, after placing reliance on the decision of the Supreme Court in the case of **Satish Mehra v. Delhi Administration and Others: 1996 (9) SCC 766** came to the following conclusion:-

“The case in hand keeping in view the facts and circumstances of the case I am of the considered view that due to the above said lapses on the part of the prosecution the accused is likely to get benefit of the same at the final stage and no useful purpose would be served by framing the charges against accused in this case. Hence both accused persons are discharged. Their sureties are also discharged.”

7. As mentioned above, the State, being aggrieved by this order of discharge, filed a revision petition before the learned Additional Sessions Judge who allowed the same by virtue of the impugned judgment dated 21.12.2004. The learned Additional Sessions Judge agreed with the learned Metropolitan Magistrate that the present case did not fall under Sections 223(a) or 223 (d) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). However, the learned Additional Sessions Judge observed that the learned Metropolitan Magistrate overlooked the fact that both the thefts were committed on the same night and the two cars from which the stereos were stolen were parked in “close vicinity” of each other and that as per the purported disclosure statements, the accused had disclosed that they had been jointly committing thefts in the past also. Consequently, the learned Additional Sessions Judge concluded as under:-

“... Thus considering the proximity in time and place of commission of offences and also the past conduct of the two accused, there were very strong reasons to suspect that the two thefts on the night between 18/19-6-98 were jointly committed by the two accused and, therefore, the joint trial of the two accused u/s 223 (c) of Cr.P.C. was perfectly in order.”

8. With regard to the issue that the purported disclosure statements did not relate to the offences in question, the learned Additional Sessions Judge observed that as the same were recorded after recovery was effected, there was no occasion for the accused persons to make any disclosure about the same. With regard to the absence of signatures on the recovery memos, the learned Additional Sessions Judge noted, with reference to a decision of the Supreme Court in the case of *Jackaran Singh v. State of Punjab*: AIR 1995 SC 2345, that though such an absence of signatures or thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts from the authenticity and reliability of the recovery memo / disclosure statement, it was only a rule of prudence and that the Supreme Court nowhere directed that a disclosure statement or recovery memo is totally excluded from consideration simply because it does not bear the signature or thumb impression of the accused. The learned Additional Sessions Judge concluded that the absence of the signature or thumb impression of the accused may dilute the credibility of the document but other evidence could be considered. The learned Additional Sessions Judge also observed that the question of ownership

of the car stereos was not material in a case of theft. The learned Additional Sessions Judge also brushed aside the recording in the site plan which indicated that the car stereos stolen at points 'A' and 'B' were both of “PIONEER” make, whereas the recovery memo showed that one stereo was of “SONY” make and the other was of “PIONEER” make. Point 'A' in the site plan was the place where the car of Shri N.P. Singh was allegedly parked. Point 'B' is the place where the car of Shri Ashok Kumar was allegedly parked. The site plan gives the impression that both the stereos were of the “PIONEER” make. The learned Additional Sessions Judge brushed aside this discrepancy between the site plan and the recovery memos by observing that *“if the I.O. made some error in the marginal notes of the site plan, the prosecution case cannot collapse for that reason.”* Finally, the learned Additional Sessions Judge concluded as under:-

“Considering all the material which was made available to the trial court, I am of the considered opinion that the two respondents could be jointly tried u/S 223 (c) of Cr.PC and charge u/s 379/411/34 IPC should have been framed against both of them. The revision therefore succeeds. The impugned order is set aside. TCR be sent back to the trial court with the direction to frame charge u/s 379/411/34 IPC against both respondents and proceed with the trial in accordance with law. TCR should reach the trial court on or before 24-1-05. Respondents shall appear before the trial court on or before 24-1-05. Respondents shall appear before the trial court on 24-1-05. Revision file be consigned to Record Room.”

9. The learned counsel appearing on behalf of the petitioners submitted that there should have been two separate FIRs and consequently two separate challans inasmuch as the alleged thefts were committed in respect of different cars at different locations belonging to different persons and by different accused. It was submitted that the site plan indicated that the cars stolen from points 'A' and 'B' were both of "PIONEER" make. It was submitted by reference to the purported seizure / recovery memo in respect of the accused Smarty Machra that a car of "SONY" make with remote was recovered from him. The seizure / recovery memo in respect of Manish Gandhi showed a recovery of a car of "PIONEER" make. It was submitted by the learned counsel that, firstly, the two offences could not be jointly tried and, secondly, the material on record was such that even if taken at face value, the same contradicted itself and, therefore, the petitioners were entitled to be discharged. Consequently, it was argued that the order of the learned Metropolitan Magistrate be restored and that of the learned Additional Sessions Judge be set aside. The learned counsel appearing on behalf of the State advanced arguments in support of the impugned judgment.

10. The issues that arise for consideration in the present revision petition are:-

- 1) Whether in the facts and circumstances of the present case, the provisions of Section 223 (c) of the Code would be attracted ?

- 2) Whether the petitioners are otherwise entitled to an order of discharge ?

11. Section 223 (c) of the Code permits several persons to be charged jointly when such persons are accused of more than one offence of the same kind committed by them jointly within the period of 12 months. To fully appreciate the meaning and purport of Section 223 (c) of the Code, it would be appropriate if the same is set out:-

“223. What persons may be charged jointly.

The following persons may be charged and tried together, namely.

- (a) xxxx xxxx xxxx xxxx xxxx ;
- (b) xxxx xxxx xxxx xxxx xxxx ;
- (c) Persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;
- (d) xxxx xxxx xxxx xxxx xxxx ;
- (e) xxxx xxxx xxxx xxxx xxxx ;
- (f) xxxx xxxx xxxx xxxx xxxx ;
- (g) xxxx xxxx xxxx xxxx xxxx :

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and, if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.”

12. The ingredients of the said provision require that the persons accused must be accused of more than one offence of the same kind within the period of 12 months. Moreover, the offences must have been committed by them jointly. With regard to the expression “offences of the same kind” reference to Section 219 is necessary as indicated in the provision itself.

Section 219 (2) of the Code reads as under:-

“219. Three offences of same kind within year may be charged together.

(1) xxx xxx xxx xxx xxx.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local laws:

Provided that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45 of 1 860) shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.”

13. Therefore, for the application of Section 223 (c) of the Code, it is necessary that the persons accused ought to have been accused of jointly committing other offences of the same kind. In the present case, the petitioners are accused of jointly having committed the offence of theft insofar as the car stereo stolen from the complainant N.P. Singh is concerned. The petitioners are also accused of having jointly committed the theft of the stereo from the car of

Mr Ashok Kumar. Therefore, *de hors* the question as to whether the petitioners had jointly committed other similar offences, other than the two involved in the present case, the provisions of Section 223 (c) of the Code would be attracted. This is so because both the offences with respect to the theft of the car stereo from the car of Mr N.P. Singh and the theft of the car stereo from Mr Ashok Kumar's car fall under Section 379 IPC. Since they possessed the stolen articles, therefore, Section 411 has also been included and as they jointly committed the crime, Section 34 is also invoked. It is another matter that the petitioners in the course of the trial may be able to establish that: a) the two offences were separate and distinct in which they are not involved jointly; b) that they were not involved in the offences at all. However, at this stage, what is to be seen is whether the persons have been accused of jointly committing more than two offences of the same kind within the period of 12 months. The two offences were committed in the intervening night of 18th and 19th June, 1998. Therefore, the stipulation with regard to the 12 month period is clearly complied with. The offences are of the same kind within the meaning of Section 219 of the Code and the petitioners have been accused of having committed the offences jointly. That being the case, I find no infirmity in the impugned order which directs that the petitioners be charged jointly for the offences under Section 379/411/34 IPC.

14. With regard to the arguments on merits, it is well-settled that the considerations which are relevant at the time of framing of charges and those at the time of conclusion of the trial are entirely different. While grave suspicion would entitle a court to frame charges, grave suspicion alone would not entitle the court to convict a person in respect of the said charges. At the time of framing of charges all that is necessary to see is that on the basis of the documents produced by the prosecution whether a grave suspicion arises with regard to the commission of the crime. The suspicion may be dispelled entirely in the course of the trial because of lack of evidence or for other reasons, but if the court has strong reasons to suspect that the crime was committed by the accused, then it would not be in error if it frames charges accordingly. All the arguments with regard to non-signing of disclosure statements and the recovery memos can be and ought to be looked into in the course of the trial and it is upto the trial court to come to the conclusion of acquittal or conviction as the case may be upon a consideration of all these factors, including any other evidence that may be lead. Based on the material available on record, I see no reason as to why the impugned order requires to be interfered with.

15. This revision petition is dismissed. It is made clear that nothing expressed herein shall be utilised to the prejudice of any of the parties in the course of the trial.

**BADAR DURREZ AHMED
(JUDGE)**

May 11, 2007
δυττ